

**STATE OF MAINE/STATE PLANNING
OFFICE**

**Determination of Public Benefit for
Juniper Ridge Landfill Expansion**

Department Order #S-020700-W5-AU-N

APPEAL – Edward S. Spencer

- **Permittee's Response to Appeal, filed jointly by SPO
and NEWSME, dated June 1, 2012**

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June 1, 2012

Ms. Sue Lessard, Chair
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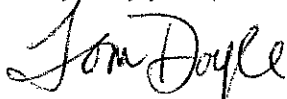
RE: In the Matter of State of Maine/State Planning Office Public Benefit Determination ("PBD")
#S-020700-W5-AU-N
Response to Appeal of Edward Spencer

Dear Madam Chair and Members of the Board:

I enclose the State Planning Office and NEWSME Landfill Operations, LLC's Response to Appeal of Edward Spencer.

In her January 31, 2012 decision, the Commissioner determined that continued operation of the Juniper Ridge Landfill after it reaches capacity, through a moderate 9.35 million cubic yard expansion, will benefit the people of Maine by helping the State meet its long-term solid waste capacity needs. Her decision is well reasoned, prudent and entirely consistent with her statutory charge. Mr. Spencer provides no justifiable basis for altering the Commissioner's determination. SPO and NEWSME respectfully request that the Board deny Mr. Spencer's appeal and affirm the PBD order in all respects.

Very truly yours,


Thomas R. Doyle

TRD/dcu
Enclosure

cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE STATE PLANNING OFFICE OLD TOWN, PENOBSCOT COUNTY, MAINE JUNIPER RIDGE LANDFILL EXPANSION #S-020700-W5-AU-N (APPROVAL WITH CONDITIONS)

PUBLIC BENEFIT
DETERMINATION

PARTIAL APPROVAL

**STATE PLANNING OFFICE
AND
NEWSME LANDFILL OPERATIONS, LLC'S
RESPONSE TO APPEAL OF EDWARD SPENCER**

The State-owned Juniper Ridge Landfill ("JRL") in Old Town is Maine's largest landfill, accepting more solid waste annually than any other landfill in the State. JRL serves all sixteen counties and only accepts waste generated in Maine. The landfill is projected to reach its currently licensed capacity in 2017 or 2018, just five or six years from now. Obtaining the federal, state and local approvals for expansion of a solid waste landfill and constructing the expansion in sufficient time so the first cell is ready to receive waste when needed is a five or six year process. To ensure that Maine is able to continue to meet its solid waste management needs beyond the next five or six years, the State Planning Office ("SPO") proposed an expansion of JRL that would provide 21.9 million cubic yard of additional capacity at the landfill. SPO estimated this expansion would provide JRL with at least 20 years of additional capacity.

State law requires that an entity seeking to expand a landfill first obtain a public benefit determination ("PBD") from the Commissioner of the Department of Environmental Protection ("Department" or "DEP"). Accordingly, on September 15, 2011, SPO applied for a PBD associated with the proposed expansion. On January 31, 2012, the Commissioner issued a partial

approval of the PBD application in which she determined that planning for 20 additional years of capacity at JRL is not necessary at this time, but that a 9.35 million cubic yard expansion, which will allow for eight to eleven years of additional capacity, will provide a substantial public benefit.

Although he states he agrees with much of the PBD, Old Town resident Edward Spencer appealed the Commissioner's PBD to the Board. Spencer argues that expansion of JRL is premature and does not meet the long-term capacity needs of the State. He asks the Board to reverse the Commissioner's determination and prevent expansion of the landfill. Rather than plan for the future, Spencer wants the State to roll the dice on whether Maine will be able to come up with some other way to meet its solid waste needs when JRL reaches its licensed capacity in 2017 or 2018. He offers no specifics about where the approximately 700,000 tons of material accepted annually at JRL will be disposed if JRL ceases operation. Instead, he suggests the State should bet on a perfect storm of events that he claims will significantly decrease the volume of solid waste generated in Maine and increase capacity at other landfills. As explained below, not only does Spencer grossly overstate the potential impact of the individual events he hypothesizes may transpire, but he offers no rational basis – because there is none – for speculating that these events will all come together simultaneously. Spencer's appeal defies prudent planning and is inconsistent with State law.

In concluding a 9.35 million cubic yard expansion will provide a substantial public benefit, the Commissioner rejected the perfect storm theory advanced by Spencer. She did, however, consider and factor into her decision – a decision that allows SPO to pursue an expansion that is less than half the size it originally sought – both the likelihood and potential impact of many of the individual events Spencer says eliminate the need for continued operation

of JRL. The Commissioner's conclusion that operation of JRL beyond the next five or six years, through a moderate 9.35 million cubic yard expansion, will benefit the people of Maine by helping the State meet its long-term solid waste capacity needs is well reasoned and entirely consistent with her statutory charge. There is no basis for the Board to alter the PBD on appeal.

I. Factual Background and Applicable Law

A. JRL is a State-owned Landfill Serving All of Maine

In 2003, the Legislature authorized the State, through SPO, to purchase JRL (then referred to as the West Old Town Landfill) from Fort James (previously known as the James River Paper Company). Resolves 2003, ch. 93. Following a competitive bid process, SPO selected Casella Waste Systems, Inc. ("CWS") to be the long-term operator, subject to negotiation of mutually acceptable contract terms. Today, NEWSME Landfill Operations, LLC ("NEWSME"), a wholly owned subsidiary of CWS, operates JRL pursuant to the Operating Services Agreement entered into by SPO and CWS.

From the outset, the value of JRL to the State has been recognized. For example, the 2003 DEP license transfer order addressed the public benefit provided by the landfill, noting: "The Department finds that the landfill will be operated to help address immediate, short-term and long term capacity needs of the region and the State." DEP Order #S-020700-WR-M-T and #L-019015-TH-C-T (Oct. 21, 2003) at 6. This remains the case. While 63 percent of the points of origin of waste accepted at JRL are within 50 miles of the landfill, JRL accepts solid waste from every county in the State and serves either directly or indirectly over 300 Maine municipalities, plantations, and townships. SPO Application for Public Benefit Determination (Sept. 15, 2011) ("PBD App.") at 1-12, 4-1, & Table 1-3.

Under the provisions of the Operating Services Agreement (“OSA”)¹ between CWS and the State of Maine and the DEP landfill permit, JRL only accepts waste generated in Maine. This waste includes a variety of non-hazardous waste streams in addition to waste materials generated in Maine that historically have been landfilled at the site (pulp and paper mill sludge and ash from Fort James and Lincoln Pulp and Paper mills). On an annual basis, JRL accepts a little more than 700,000 tons of material for placement in the landfill. This total includes solid waste accepted for disposal and CDD fines recycled as alternative daily cover. For example, in 2010, JRL accepted 708,198 tons of material. PBD App. at 1-5, n. 8 (referencing JRL Annual Report). This figure includes the solid waste disposed at the landfill and the CDD fines used as alternate daily cover.² Illustrative of the types of solid waste accepted at JRL, in 2010 the landfill accepted the following broad categories of waste:

- CDD;
- Front-end process residuals (“FEPR”)³;
- Municipal solid waste (“MSW”) incinerator ash;
- Oversized bulky waste (“OBW”)⁴;
- Waste water treatment plant and miscellaneous biosolids/sludge materials;
- MSW bypass⁵ and MSW bypass used in soft layer of base cells;
- Biomass and fossil fuel combustion ash;
- Miscellaneous waste⁶; and
- Contaminated soils. PBD App. at 1-5.

¹ On February 5, 2004, CWS and the State of Maine entered into the OSA, an agreement that governs operation of JRL.

² Under State statute, 38 M.R.S. § 1310-N(5-A)(B)(2), the use of CDD fines as alternative daily cover is considered recycling and not disposal since use of the fines replace the need to use virgin soil as daily cover. CDD fines are not the only material used as daily cover at JRL.

³ FEPR is “solid waste removed by processing prior to incineration or landfilling, including but not limited to ferrous metals, glass, grit and fine organic matter.” DEP Rules, Ch. 401(1)(FFF).

⁴ OBW consists of large items that are difficult to incinerate or process, such as mattresses, furniture, and certain components of CDD.

⁵ MSW bypass is municipal solid waste “that is destined for disposal, processing, or beneficial use at a solid waste disposal facility, but which cannot be disposed, processed, or beneficially used at that facility because of malfunction, insufficient capacity, inability of the facility to process or burn, down-time, or any other reason.” DEP Rules, Ch. 401(1)(V); *see also* Ch. 401(1)(NNNN) (containing definition of municipal solid waste).

⁶ Miscellaneous wastes include, for example, spoiled food, oil debris, sand, waste grit, and non-friable asbestos. (W3107822.2)

B. Maine's Other Landfills

In addition to JRL, there are eleven other landfills of note in Maine that accept solid waste.⁷ These landfills, however, are not fungible or perfect substitutes for one another. Rather, nearly all of these landfills play a specific role for specific communities. The eleven landfills fall into one of three general categories: municipal landfills, municipal ash landfills, or commercial landfills.

Municipal Landfills. Eight of the landfills are municipally-owned and managed to serve these specific municipalities. Rather than accepting waste from anywhere in the State, these landfills are used almost exclusively for disposal of solid waste (e.g., unprocessed MSW and CDD) generated within the community or group of communities that owns the landfill. These eight landfills are: Augusta (Hatch Hill), Bath, Brunswick, Fort Fairfield (TriCommunity), Greenville, Midcoast SWC, Presque Isle, and Rockland. PBD App. at 2-1. In 2010, the combined amount of material accepted at these landfills (waste plus daily cover) totaled 200,594 tons.⁸

⁷ Generator-owned landfills, which by definition support the disposal of waste generated by the owner of the landfill (e.g., pulp and paper landfills) are not included in this list. The Dolby Landfill in Millinocket, which recently was purchased by the State, is not included in this list either. Although no longer a generator-owned landfill, the DEP transfer order limits the waste that may be disposed at Dolby to waste generated at either the Millinocket or East Millinocket mills. As a result, this landfill is limited to effectively operating as though it still were a generator-owned landfill. Finally, unlined, local CDD landfills are not included in this list. These landfills accept locally-generated CDD, inert fill, brush, and trees. These provide short-transport options for disposal of these wastes. The majority of these landfills are small, less than six acres in size. Although important locally, these landfills typically are not considered when evaluating the state's solid waste disposal needs and capacity. SPO, *Solid Waste Generation & Disposal Capacity Report For Calendar Year 2009*, 24-25 (January 2011) (attached to PBD Application at App. A.).

⁸ The municipal landfills accepted the following amount of material in 2010. Consistent with the approach adopted by SPO, where the municipal landfill reported the volume of daily cover used in 2010 in cubic yards, it is assumed that one cubic yard equals one ton:

- *Augusta (Hatch Hill)*: 60,847 tons (City of Augusta, 2010 Landfill Annual Report, Hatch Hill Solid Waste Disposal Facility, at 3.
- *Bath*: 28,475 tons (City of Bath, 2010 Annual Solid Waste Management Report, § 6 (March 10, 2011).)
- *Brunswick*: 10,109 tons (Town of Brunswick, 2010 Annual Solid Waste Management Report, § 6 (April 29, 2011).)

Municipal Ash Landfills. Two of the eleven landfills are either municipally-owned or owned and operated by a regional entity and are used almost exclusively in conjunction with companion waste-to-energy facilities. The Lewiston landfill primarily accepts residues from the Mid-Maine Waste Action Corporation (“MMWAC”) waste-to-energy incinerator, while residue from the ecomaine waste-to-energy facility in Portland is sent to its own landfill in Scarborough. PBD App. at 2-2. In 2010, the amount of material accepted at these landfills (waste plus daily cover) totaled 65,921 tons.⁹

Commercial Landfills. State law prohibits the construction of new, commercial solid waste disposal facilities. Only one privately owned landfill continues to operate in Maine, the Crossroads Landfill in Norridgewock, which is owned by Waste Management. PBD App. at 2-2. Crossroads is licensed to accept MSW, CDD, and special waste. Of all the landfills, Crossroads is the one most similar to JRL in terms of the categories of waste accepted and the fact that it is not operated to serve municipalities with an ownership interest in the landfill. As a commercial landfill, however, Crossroads may accept out-of-State waste. In 2010, Crossroads accepted 258,376 tons of material (waste plus alternative daily cover). Waste Management Disposal Services of Maine, Inc., 2010 Annual Solid Waste Management Report, §§ 2.1 and 2.6.

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- *Greenville:* 4,113 tons (assuming 0.5 tons/cubic yard of MSW) (Town of Greenville, 2010 Annual Report for Solid Waste Disposal Facility Little Squaw Township (T3R5), Maine, at 3 (May 2011).)
 - *Mid Coast Solid Waste Corp.:* 6,691 tons (Mid Coast Solid Waste Corporation, 2010 Annual Solid Waste Management Report, § 1.)
 - *Rockland:* 37,724 tons (Rockland Solid Waste Facility, 2010 Annual Solid Waste Management Report, § 6.)
 - *Presque Isle:* 17,194 tons (Presque Isle Region, 2010 Annual Solid Waste Management Report, § 6.)
 - *Tri-Community:* 35,441 tons (Tri-Community Recycling & Sanitary Landfill, 2010 Annual Solid Waste Management Report, § 6.)

⁹ The Lewiston landfill accepted 18,855.2 tons of solid waste and landfill cover combined in 2010. City of Lewiston Solid Waste and Recycling Facility, 2010 Annual Report for Landfill Operations, Table 1 (April 26, 2011). The ecomaine landfill accepted 47,066 tons of solid waste in 2010. ecomaine, 2010 Annual Solid Waste Incinerator Report, Form B: Waste Handling Summary (April 15, 2011).
{W3107822.2}

C. Maine's Landfill Capacity Needs and JRL's Role in Meeting These Needs

As noted above, JRL plays a central role in the management of solid waste in Maine. On an annual basis, JRL accepts more solid waste than the other eleven landfills combined and, in the course of doing so, serves every county and more than 300 municipalities, plantations, and townships in Maine.

JRL is approaching the end of its licensed capacity. As required by State law, SPO has estimated the future lifespan of the landfill.¹⁰ Recognizing the relationship between the amount of waste generated and the level of economic activity, SPO projected when JRL will reach capacity under multiple growth scenarios, ranging from zero economic growth to a blend of zero growth in early years to 2.8 percent growth in later years. SPO, *Solid Waste Generation & Disposal Capacity Report For Calendar Year 2009*, 40 (January 2011) (the "Capacity Report") (attached to PBD Application at App. A.). Under all of these scenarios, JRL is expected to reach its licensed capacity in 2017 or 2018. Capacity Report at 31, 40.

If JRL were to stop accepting waste in 2017 or 2018, where would the approximately 700,000 tons of solid waste received annually at JRL go? It is unlikely any of the eight municipal solid waste landfills would desire to accept the waste streams now accepted by JRL. More likely, the municipal landfills would opt to preserve space for the communities that own and currently use these eight landfills. Additionally, not all of these landfills are licensed to accept all the same waste streams as JRL and three (Greenville, Midcoast SWC, and Rockland) are unlined. Further, the municipal landfills simply do not have the capacity to take the waste streams currently handled by JRL. As of the end of 2009, the eight municipal landfills had a combined capacity of 4.9 million cubic yards, with 36 percent of this capacity in two landfills

¹⁰ Pursuant to 38 M.R.S. § 2124-A, SPO must submit a report to the Legislature each year with information on "statewide generation of solid waste, statewide recycling rates and available disposal capacity for solid waste." (W3107822.2)

located in Aroostook County (Presque Isle and Tri-Community in Fort Fairfield). Apart from the fact that a considerable portion of this municipal landfill capacity is not located in a geographic area suited to serving the entire State, if 700,000 tons per year (or approximately 813,953 cubic yards per year¹¹) of waste were delivered to these landfills in addition to the waste they accept annually from their member communities, this capacity would be exhausted in three years.¹² As a result, even if every municipal landfill were willing to accept waste streams currently handled by JRL, were licensed to do so, and geographically situated to do so – three factors that are not present – these landfills would not have the capacity to fill JRL’s role for any meaningful period.

Similarly, the two municipal ash landfills, either in conjunction with the eight municipal landfills or on their own, would not be a substitute for JRL if JRL were filled to capacity in 2017 or 2018. First and most critically, it is unlikely either one would want to accept waste streams currently accepted by JRL. Second, they are not licensed to receive the same waste streams as JRL. The ecomaine landfill, for example is licensed to receive incinerator ash, MSW, and wastewater treatment plant grits and screening. This landfill cannot accept CDD. DEP Order, #S-013127-WD-AH-N (May 21, 2004); DEP Order, #L-013127-07-A-N (July 9, 1986). Third, even if both municipal ash landfills were willing and authorized by their licenses to accept the waste streams currently handled at JRL, they would not have the capacity to fill JRL’s role. By 2019, the two ash landfills are projected to have only approximately 450,000 cubic yards of capacity combined. Capacity Report at 11. This equates to roughly enough space to accommodate half a year’s worth of waste currently disposed of at JRL.

¹¹ There are approximately 0.86 tons of waste per cubic yard at JRL. Capacity Report at Appendix A, data note 3.

¹² To put the collective capacity of the municipal landfills in perspective, in the year 2019 (a year or two after JRL is projected to exhaust its capacity if it is not expanded), SPO has estimated the municipal landfills will have approximately 2.7 million cubic yards of capacity. Capacity Report at 11. This amount of space would be consumed in three years, and possibly less time, if waste streams currently accepted at JRL were added to the waste already being accepted from the municipalities owning the landfills.

(W3107822.2)

Of all the landfills operating in the State, the commercial landfill, Crossroads, is the only one that likely would be willing to accept the waste streams currently handled at JRL.

Crossroads, however, is not positioned to serve Maine if JRL were to close. SPO estimates that by 2019 capacity at this landfill will be approximately 1.1 million cubic yards, Capacity Report at 11, which is not sufficient to serve both its existing customers and accept the waste currently managed at JRL for more than a year.

Recognizing the critical role JRL plays in the management of Maine's solid waste and the need to plan now for ensuring that the State's waste management needs are met beyond 2017/2018, SPO explained in the Capacity Report presented to the Legislature in 2011:

The largest single source of Maine's disposal capacity is the state-owned Juniper Ridge Landfill, which has capacity through 2017-2018. To avoid a shortfall in landfill capacity, the State needs to begin the application process for additional, state-owned landfill capacity at the landfill in 2011. This timeframe takes into account the current economic slowdown, and the anticipated duration of the complete development process, from the initial presentation of the application for public benefit determination, the permitting process, through construction of new capacity licensed and prepared to receive waste.

Capacity Report at 31.

D. The Public Benefit Determination Process Required by Statute

Before applying to DEP for a solid waste license authorizing expansion of a landfill, State law requires that "a person must apply to the commissioner for a determination of whether the proposed facility provides a substantial public benefit." 38 M.R.S. § 1310-AA(1). In the case of a landfill that accepts only in-State waste, such as JRL, the Commissioner of the Department is directed to find that a proposed facility provides a substantial public benefit if the applicant demonstrates to the Commissioner that the proposed facility:

- A. Meets immediate, short-term or long-term capacity needs of the State;
- B. . . . [I]s consistent with the state waste management and recycling plan; [and]

{W3107822.2}

- C. Is not inconsistent with local, regional or state waste collection, storage, transportation, processing or disposal

Id. § 1310-AA(3). “The commissioner’s decision under [Section 1310-AA] may be appealed to the board, but the board is not authorized to assume jurisdiction of a decision under this section.”

Id. § 1310-AA(2).

E. SPO’s Application and the Commissioner’s Public Benefit Determination Regarding JRL

Permitting a landfill expansion and completing the construction necessary for the expanded area to be ready to accept solid waste is a five to six year process. PBD App. at Fig. 2-1. Recognizing that JRL will reach its licensed capacity in five or six years, on September 15, 2011, SPO submitted its PBD application for a proposed 21.9 million cubic yard expansion of JRL. As presented in the application, the expansion would be completed in three phases, with an opportunity for the Department to request additional information prior to the development of each additional phase to confirm the information used to support the initial PBD remains accurate. PBD App. at 1-18 to 1-21. With all three phases combined, the proposed expansion was intended to provide JRL with at least 20 additional years of capacity. PBD App. at 1-8, 1-18.

On January 31, 2012, the Commissioner approved SPO’s PBD application, but only for a 9.35 million cubic yard expansion. DEP Order #S-020700-W5-AU-N (Jan. 31, 2012) (“PBD Order”) at 29. The Commissioner found that SPO demonstrated that expansion of JRL satisfies the three statutory review criteria, but that in planning for the State’s long-term capacity needs it is not necessary to extend the life of JRL by 20 years. PBD Order at 21-22. Instead, the Commissioner concluded a 9.35 million cubic yard expansion, which would provide JRL with approximately 10 additional years of capacity, is more appropriate and all that is presently needed to meet the State’s long-term capacity needs. PBD Order at 21-22.

{W3107822.2}

F. Spencer's Appeal

On February 29, 2012, Edward Spencer appealed the Commissioner's PBD approval to the Board. Spencer states in his filing that he "agrees with almost all Department findings" in the PBD Order. Spencer Appeal at 1.¹³ He only challenges the Commissioner's finding that a 9.35 million cubic yard expansion satisfies 38 M.R.S. § 1310-AA(3)(A) and meets immediate, short-term or long-term capacity needs of the State. Spencer Appeal at 1. Accordingly, SPO and NEWSME focus solely on this issue on appeal.

II. Discussion of Spencer's Appeal

Spencer advances three basic arguments why he believes expansion of JRL does not meet the State's long-term capacity needs and, as a result, why the PBD approval should be reversed and the expansion of JRL should be denied. Each of the three arguments is discussed in turn below, along with their subparts.

A. Spencer's Call for the State to Bet on a Prolonged Economic Downturn and Depressed Waste Generation Rates Defies Prudent Planning and Could Lead to a Solid Waste Management Crisis in Maine.

In the PBD approval, the Commissioner appropriately recognizes that there is a correlation between the level of economic activity and the volume of waste generated. She states that if (a) "existing solid waste disposal options remain available" and (b) "waste generation rates remain depressed" it is "likely," although not certain, that Maine would have sufficient disposal capacity for the next ten years to handle waste generated in Maine. PBD Order at 19. The Commissioner goes on to explain:

[W]hether the amount of waste needing disposal will decrease, level off or increase in the future is uncertain at this time. However, the Commissioner finds that it is reasonable and prudent to plan for an increase in capacity needs based on

¹³ The pages of Edward Spencer's appeal are not numbered. For the purpose of referencing this document we have numbered the pages of the appeal one through five.
(W3107822.2)

expected eventual improvement in the economy. Accordingly, to ensure the availability of adequate long-term capacity given current outstanding issues related to Maine's solid waste management system, and the difficulty in guaranteeing the time period from submission of an application for a new or expanded landfill through final appeals and construction, the Commissioner finds that the 9.35 million cubic yards of capacity estimated for Phase II of the expansion proposal would adequately ensure that Maine could meet its long-term disposal capacity needs.

PBD Order at 21.

Spencer simply disagrees with the Commissioner's reasoning and argues against prudent planning. He believes a depressed economy will continue, waste generation rates will be reduced, and, thus, expansion of JRL is not needed to meet the State's long-term waste management needs. He argues:

We are technically out of recession, but any number of events nationally or internationally could lead us back into serious recession: European debt crisis, massive U.S. deficits and debt, and most recently higher fuel prices that threaten to remove any gains in consumer expendable income, to name a few.

Spencer Appeal at 2, para. #1. The Commissioner acted appropriately in rejecting Spencer's line of thinking, which calls for putting off addressing the State's waste management needs based on a bet against the economy recovering, in favor of what she appropriately calls a "reasonable and prudent" approach to planning.

Additionally, her decision to do so is supported by the data. The Capacity Report projects JRL will reach its licensed capacity by 2017 or 2018, depending on whether one assumes a zero growth scenario in waste accepted at the landfill or a modest growth scenario that assumes 2.8 percent annual growth in later years. Capacity Report at 40. The Capacity Report is based on actual data through 2009 and projections thereafter. Under even a zero growth scenario the Capacity Report estimated JRL would receive 700,000 tons of waste annually in future years, filling the landfill by 2018. Capacity Report at 40. In 2010, JRL received 708,198 tons of

material and in 2011 (based on aggregation of the monthly reports) JRL received 706,452 tons of material. PBD Order at Attachment E. These results firmly support the conclusion and recommendation of the Capacity Report that JRL has capacity through 2017-2018 and that “[t]o avoid a shortfall in landfill capacity, the State needs to begin the application process for additional, state-owned, landfill capacity at that landfill in 2011.” Capacity Report at 31. These results also support the Commissioner’s determination that a limited, 9.35 million cubic yard expansion of JRL to allow operation beyond 2017/2018 meets the State’s long-term capacity needs. PBD Order at 21-22. As noted in Section I.C above, when JRL reaches capacity in 2017 or 2018, other existing landfills cannot be counted on to accommodate all of the waste currently managed by JRL, even at the quantities JRL is receiving during the present economic downturn.¹⁴

B. The Events Spencer Claims Will Reduce the Need for More Landfill Capacity Are Purely Speculative and Would Not Yield the Type of Results Spencer Suggests, Even if the Events Materialized.

In the alternative, Spencer claims that if the economy does not remain depressed, “there are many solutions attainable that will result in lower waste volumes being deposited in Maine,” eliminating the need to expand JRL. Spencer Appeal at 3, para. #2 (emphasis added). The changes Spencer states “will” occur are more appropriately categorized as changes he would like to see occur. He also overstates the potential impact of these desired changes. For planning purposes and evaluation of whether expansion of JRL meets the State’s long-term capacity needs, realistic projections about what those needs will be must be considered. This is what the Commissioner has done.

¹⁴ Regardless of the state of the economy, under the terms of the OSA, JRL is required to provide 1.1 million tons of disposal capacity for mill waste from Old Town Fuel and Fiber and for biomass ash from Lincoln Paper & Tissue, with this amount of dedicated disposal capacity declining at a rate of 50,000 tons per year. See OSA at Section 2.10; PBD App. at 1-16, n. 18; and Capacity Report at 22, n. 14.
(W3107822.2)

Additionally, while Spencer compiled his list of waste-reducing changes he would like to see and believes would eliminate the need for expansion of JRL, he conveniently chose to ignore equally, if not more, likely factors that would increase waste disposal needs. For example, the disposal and power purchase agreements at one of Maine's four waste-to-energy facilities, the Penobscot Energy Recovery Company ("PERC"), are set to expire in 2018. As the Commissioner notes, a group representing municipalities currently served by PERC has been formed and "reportedly, the group will be considering [acquiring] total ownership of PERC as well as other disposal options." PBD Order at 15. If PERC were to close, how the significant amount of in-state MSW currently handled by the facility would be managed is unknown, but it likely would have to be landfilled.¹⁵ Such a possibility cannot be ignored by Spencer if he is going to speculate about future events with the potential to impact disposal needs.

1. There is No Reasonable Basis for Projecting a Significant Decrease in the Amount of CDD Residue Needing Placement in a Landfill.

Three of the possible changes Spencer would like to see are related in that he claims they would reduce CDD residue needing disposal, thus preserving landfill space and eliminating the need to expand JRL. Spencer Appeal at 3, para. 2(A), (C) and (D). The CDD residue received at JRL comes from KTI Biofuels ("KTI") in Lewiston and falls into two categories, oversized bulky waste ("OBW") and CDD fines. KTI has been processing CDD to produce biofuels since 1988. The recycling rate at this facility was 53 percent in 2010. Letter from SPO and NEWMSE Landfill Operations LLC to Commissioner P. Aho re "JRL Expansion Public Benefit Determination (PBD) Application; MEDEP #S-020700-W5-AU-N" (Nov. 21, 2011) at 6. In 2011, with DEP approval, KTI implemented facility improvements to increase the amount of recycled materials extracted from the CDD supply. *Id.* at 8.

¹⁵ In 2009, for example, PERC received approximately 225,000 tons of in-State waste. PBD App. at 1-10, n. 15. (W3107822.2)

Spencer points to a 2010 law requiring processing facilities that generate residue requiring disposal “to recycle or process into fuel for combustion all waste accepted at the facility to the maximum extent practicable, but in no case at a rate of less than 50%.” 38 M.R.S. § 1310-N(5-A)(B)(2). He claims full implementation should reduce waste sent to JRL. Spencer Appeal at 3, para. #2(D). KTI, however, already complies with this requirement. While KTI recently implemented facility upgrades intended to increase recycling, the overall impact of this recently adopted statutory requirement will have only a marginal impact on near-term capacity at JRL and will not alter the need for an expansion. The Commissioner was fully aware of this law, PBD Order at 12-13, and appropriately recognized that expansion of JRL still meets the State’s long-term capacity needs. This 2010 legislation is not a silver bullet as Spencer suggests.

In a separate subparagraph, Spencer makes the same argument again, but casts it differently so as to appear to be making an additional point. Spencer Appeal at 3, para. #2(C). Spencer notes that in the PBD Order the Commissioner states that if and when a license is issued for the construction and operation of an expansion, she “finds that it necessary and appropriate to establish a limit on the tonnage of OBW disposed in the expansion.” PBD Order at 20. The Commissioner explains, the limit will be based upon the results of annual demonstrations that:

waste processing facilities that generate residue requiring disposal will “recycle or process into fuel for combustion all waste accepted at the facility to the maximum extent practicable, but in no case at a rate less than 50%”, submitted by CDD processing facilities that send OBW to Juniper Ridge Landfill for disposal. Annually the Department will reevaluate and may modify this limit.

PBD Order at 20 (quoting DEP Rules Ch. 409(2)(C), which implements 38 M.R.S. § 1310-N(5-A)(2)(B)). In other words, the Commissioner says the Department will establish an OBW cap to ensure compliance with Section 1310-N(5-A)(2)(B). Since KTI is complying and will continue to comply with this statutory requirement, the calculation of a cap based on this requirement will

not achieve any additional reduction. Spencer claims that if such a cap were put in place in the near future, as opposed to in the course of a future licensing proceeding associated with actual development of an expansion, “this would save valuable space.” Spencer Appeal at 3, para. #2(C). He fails to recognize, however, that such a cap is simply a belt and suspenders approach to ensuring compliance with an existing law. Since KTI already is in compliance, and Spencer offers no evidence to the contrary, no additional capacity would be preserved at JRL by the approach Spencer advocates.

Spencer also says he would like to see the OSA between SPO and CWS amended to reduce the amount of CDD processing residue accepted at JRL. Spencer Appeal at 3, para. #2(A). The Commissioner similarly would like to see such a modification. PBD Order at 19. The OSA, however, simply allows disposal of residue from CDD processing at JRL consistent with State law and without added restrictions that Spencer appears to seek. This reflects the fact that, as a condition of JRL operations, the State required CWS to assume fuel supply obligations with the mill in Old Town and recognized that CDD processing would be required to meet the supply obligations. CDD residue needing disposal necessarily would accompany the CDD processing. The Second Amendment to the OSA, which Spencer and the Commissioner specifically reference, followed agreement by CWS, at the State’s urging in 2006, to extend the fuel supply agreement to the new owner of the Old Town mill. This agreement between CWS and the current mill owner remains in place today. While Spencer and the Commissioner may wish that the OSA would be modified or that the fuel supply agreement between CWS and the mill owner did not exist, this desire does not change the fact that both contracts are in place and are legally binding documents. As a result, future solid waste management planning must not ignore CDD processing and the need to dispose of CDD processing residue based on the

processing that legally exists today and is expected to legally exist in the future. Thus, there is no basis as Spencer suggests for assuming “greatly reduce[d] CDD fuel residues” when evaluating whether the modest expansion provided for in the PBD approval meets the long-term capacity needs of the State.¹⁶

2. De-linking JRL’s DEP Landfill License from Maine Energy’s DEP Incinerator License Would Not Have a Material Effect on the Waste Disposed at JRL or the State’s Solid Waste Management Needs.

The existing DEP license for JRL contains a condition that limits the total amount of (a) unprocessed MSW incinerated at Maine Energy in Biddeford and (b) MSW bypassed from Maine Energy for disposal at JRL to no more than 310,000 tons per year. DEP Order, #S-020700-WD-N-A, Condition 16(C) (April 9, 2004). The Commissioner believes that de-linking these two licenses and placing a cap on the amount of MSW bypass JRL may receive from Maine Energy is a better way to limit this waste stream.¹⁷ PBD Order at 21. The Commissioner states that any future expansion license will have a 25,000 ton annual cap on MSW bypass from Maine Energy. PBD Order at 21. Spencer wants the licenses de-linked now, claiming the result would be less MSW bypass going to JRL. Spencer Appeal at 3, para. #2(B).

How, from a legal perspective, this de-linking could be achieved in the near term and the new MSW bypass cap imposed is not clear and not discussed by Spencer. This, alone, shows

¹⁶ Spencer also suggests a reduction in CDD residue accepted at JRL would have a larger impact on capacity at the landfill than is likely to be the case. First, he suggests a relationship between tons of residue and volume that fails to recognize the effect commingling of wastes placed in JRL has on overall in-place densities and, thus, overall capacity consumed in the landfill. Removing one type of waste, especially when the waste is a fine material such as CDD residue, will not result in a one to one reduction in waste volume consumed. This is because as wastes are comingled, the voids present in one waste type will be filled with the other material, such as CDD residue. So, one ton of type A waste comingled with one ton of type B waste will not result in the consumption of landfill space which is the direct sum of the individual volumes of the two wastes at their respective densities. Second, CDD fines are recycled as alternative daily cover at JRL. Thus, if the amount of CDD residue delivered to JRL decreased, the use of some other material, including possibly virgin soil (DEP Ch. 401.4. C (8) (a)), would have to increase in order to provide the necessary daily cover. The result is no meaningful change in the landfill’s capacity.

¹⁷ NEWSME and SPO do not agree with the Commissioner’s conclusion that the combined 310,000 cap somehow contributes to Maine Energy creating more MSW bypass than if the licenses for JRL and Maine Energy were not linked.

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why it would be inappropriate to build the corresponding reduction into any evaluation of the State's future capacity needs.

Additionally, whether there would be any reduction with the de-linking and cap would depend on the year. For example, as Spencer notes, in 2010 the total amount of MSW bypass from Maine Energy received at JRL was 37,561 tons, while the total in 2011 was 22,305. Spencer Appeal at 3, para. #2(B). Further, to the extent any reduction would result, the reduction would be so minor as to have a negligible effect on the State's long-term capacity needs. This is the case for two reasons. First, even a 4,000 or 5,000 ton reduction in MSW bypass received at JRL annually would represent less than a one percent reduction in the tons of waste received at the landfill annually. Second, since a portion of the MSW bypass is used to create a "soft layer" that provides a required protective layer over the base cells of the landfill liner, if MSW bypass is not used in this layer some other material will have to be substituted. Previously, JRL has used clean wood chips and bark as a soft layer component, materials that otherwise might not have been placed in the landfill. If materials have to be used in the soft layer that otherwise would not be disposed of at the landfill, any capacity gains from limiting MSW bypass are offset by the utilization of the other materials.¹⁸

3. There is No Rational Basis for Believing the Hypothetical Construction of a CDD Processing Facility at the JRL Site Will Occur or for Attempting to Factor Such a Facility into the Evaluation of the State's Long-Term Capacity Needs.

Spencer asks: "What if there was a CDD processing facility located on the JRL site."

Spencer Appeal at 3, para. 2(E). In answering his own question, Spencer suggests such a facility

¹⁸ DEP recommends the use of MSW bypass as the soft layer at JRL. See DEP Order, #S-020700-WD-W-M at 6 (Sept. 10, 2010) (approving use of MSW bypass as the soft layer and noting that "Staff recommended that MSW bypass be the primary waste used in the Soft layer at Juniper Ridge"); Board Order, #S-020700-WD-W-M at 15 (March 3, 2011) (affirming use of MSW bypass as the soft layer and noting staff recommended use of MSW bypass).
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would reduce the need for future capacity. The potential impact of a hypothetical processing facility at JRL, however, is completely irrelevant to the issue of whether the expansion of JRL meets the State's actual long-term capacity needs. There is absolutely no reason to believe any such facility will be built. None is planned and, given the capital costs associated with developing and operating such a facility and the limited market, beyond what exists today, for processed CDD fuel, there is no reason to believe one will be built anytime in the near future. Such a hypothetical should not be factored into the State's planning or the Commissioner's evaluation of the State's capacity needs. One could conceivably come up with endless hypotheticals that, if they ever materialized, would either increase or decrease capacity needs. But when divorced from reality, such hypotheticals must not play a role in the Commissioner's PBD review.

C. The Unknowns Identified by Spencer Do Not Alter the Commissioner's Finding that Expansion of JRL Meets the State's Long-Term Capacity Needs.

Spencer's third overarching argument is that there were too many unknowns at the time the Commissioner issued the PBD approval and that she should have denied SPO's application to allow for the passage of time and resolution of the unknowns. Spencer Appeal at 4, para. #3. This is an argument one will always be able to make with regard to a PBD. The statute requires prompt action by a Commissioner when reviewing a PBD application, specifying a decision must be made within 60 days of receiving an application. 38 M.R.S. § 1310-AA(2). Unknowns about the future and the outcome of pending actions will always exist, leaving the Commissioner to make the determination with the available information. Recognizing that critical factors may change or critical information may develop, the statute allows the Department to revise a PBD in the event of a material change in the underlying facts or circumstances upon which a PBD

approval was based. *Id.* § 1310-AA(5). Thus, the statute strikes a balance by requiring prompt review by the Commissioner based on the facts at the time of the application, but allowing for correction in the future, if warranted. What the Legislature made clear in striking this balance is that uncertainty about the future is not grounds in and of itself for denying a PBD application.

The present case is no exception in that some uncertainty exists about how solid waste will be handled and regulated in Maine in the future. Consistent with her statutory charge, however, rather than be paralyzed by the inability to perfectly predict the future, the Commissioner considered (as did the applicant, SPO) the factors contributing to uncertainty and then made a reasoned and informed decision. This is what the statute requires. There is no basis for reversing the Commissioner's decision.

1. It Would Be Imprudent and Inconsistent with State Law to Deny Expansion of JRL Based on a Bet that the Dolby Landfill Will Assume the Role of JRL.

In 2011, as the Commissioner acknowledges in the determination, the State acquired the Dolby Landfill in East Millinocket. PBD Order at 10. Spencer suggests the potential for Dolby to serve the State's solid waste management needs justifies denial of the PBD associated with expansion of JRL. Spencer Appeal at 4, para. #3(A). The Commissioner, however, reasonably and appropriately saw things differently. As she notes, Dolby only has approximately 300,000 cubic yards of licensed capacity remaining (less than half the volume JRL uses in a single year) and the transfer order associated with the State's acquisition of Dolby only allows for the disposal of wastes from the Millinocket and East Millinocket mills. Moreover, the existing Dolby landfill is an unlined landfill and has caused impacts to groundwater that would need to be

corrected before any expansion could be licensed,¹⁹ not to mention the PBD and other planning and licensing process hurdles that would need to be crossed. Given these factors, it is not reasonable to consider expansion of Dolby as a substitute for expansion of JRL. Such an expansion may never occur (given the lengthy and complex permitting process that would be required) and could not occur in time to prevent a gap in disposal capacity when JRL reaches its licensed capacity in 2017 or 2018. The State's acquisition of Dolby does not alter the need to expand JRL.

2. The Prospect that the Crossroads Landfill May Expand in the Future Does Not Justify Reversal of the Commissioner's Finding that Expansion of JRL Meets the State's Long-Term Capacity Needs.

At the time SPO submitted its PBD application and the Commissioner issued her determination, legislation was pending in the Legislature that proposed to lift the ban on expansion of a single commercial landfill, the potential expansion of the Crossroads landfill in Norridgewock. L.D. 879 (125th Legis.). SPO specifically acknowledged L.D. 879 in its application, noting that even if L.D. 879 were enacted Crossroads was a long way from providing additional landfill capacity. For example, the owner of the Landfill still would have to acquire the adjacent property where any expansion would occur; conduct a Preliminary Information Report and all required field survey work; obtain a Determination of Environmental Feasibility; obtain a positive PBD; and undergo full licensing (DEP, Army Corps, local etc.). PBD App. at 2-3, n. 30. The Commissioner similarly acknowledged that potential development of disposal capacity at other landfills was one of the unknowns at the time she made the determination. PBD Order at 17.

¹⁹ DEP Ch. 400. 2.A (1) ("An existing solid waste facility which has been found to be contaminating ground water or classified surface water must demonstrate successful corrective action before a license may be issued pursuant to these rules.").
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While Spencer suggests that in light of L.D. 879 the Commissioner should have denied SPO's PBD application, such a suggestion defies logic and is inconsistent with the clear intent of the PBD statute. The question before the Commissioner was whether expansion of JRL meets the State's long-term capacity needs. At the time of her decision, the law did not allow expansion of Crossroads and no expansion had even been proposed. If the legislation were adopted, there was no guarantee an expansion would be sought and if sought, any expansion would be many years away, coming after JRL reaches its licensed capacity. The Commissioner had no justifiable basis for finding expansion of JRL would not meet the State's long term needs because of the possibility that a yet-to-be-proposed expansion may occur at some point in the future.²⁰ To have done so would have invited a solid waste crisis when JRL's capacity is filled in 2017 or 2018, leaving no landfill capable of assuming JRL's role.²¹

3. The Commissioner Reasonably Considered the Potential Adoption of Legislation Establishing New Waste Disposal Fees and Found Expansion of JRL Meets the State's Long-Term Capacity Needs.

Another piece of legislation pending at the time the Commissioner made her decision, L.D. 1278, proposed to impose a per ton waste handling fee on the disposal of CDD and CDD residue, similar to the fees already charged for landfill disposal of other types of waste. Spencer suggests that given this pending legislation, approval of the PBD was improper. Spencer Appeal at 4, para. #3(C). The Commissioner, however, acknowledged this legislation and that it had the

²⁰ If the mere potential for another landfill to seek expansion approval is sufficient to defeat SPO's application for a public benefit determination, then no landfill could ever obtain a favorable public benefit determination so long as there is another landfill in the State that might expand. This would mean that if JRL cannot obtain a PBD because Crossroads may expand in the future, Crossroads, too, would not be able to obtain a PBD because JRL might expand in the future. The absurdity of this circular reasoning underscores the flaw in Spencer's argument.

²¹ After the Commissioner's decision and close of the record, the Legislature approved L.D. 879. Any expansion of Crossroads, however, remains purely speculative at this time. The Commissioner applied sound reasoning based on the information in hand at the time of her determination. For that reason, her PBD approval should be upheld. SPO and CWS additionally note that the passage of L.D. 879 in no way materially alters the basis for the Commissioner's determination.

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potential to impact “solid waste capacity needs to some extent.” PBD Order at 17. At the same time, the Commissioner correctly found that regardless of this pending legislation the expansion of JRL would meet the State’s long-term needs. Further, any potential impact on the amount of CDD and CDD residue associated with a small per ton fee, would be marginal, at most, and not significant enough to extend the life of JRL or eliminate the need for expansion. This fee would align CDD and CDD residue with other waste streams for which a fee is required and would generate added revenue, with the expectation that the fee simply would be passed through to those generating the waste. The legislation was never viewed as a bill intended to modify CDD generating behavior, for example, by prompting a reduction in demolition of existing structures to allow for new development.²²

4. There is No Rational Reason to Believe that the State’s Recycling Rates will Increase Simply if Oversight Changes from SPO to DEP.

In what appears to be as much an attempt at sarcasm rather than an effort to present a legitimate argument, Spencer points to another piece of legislation pending at the time the Commissioner made the determination (L.D. 1458), which proposed to shift recycling technical assistance and solid waste disposal policy responsibilities from SPO to DEP, and stated:

Under SPO, our recycling rates have been stagnant for years. Surely the Commissioner agrees that DEP can be a leader in improving recycling rates. This would further reduce the need for expansion at JRL.

Spencer Appeal at 4, para. #3(D). While SPO and CWS agree that DEP and the Commissioner can be a leader in the effort to improve recycling, neither believes the Department nor

²² After the Commissioner’s decision and close of the record, the Legislature approved L.D. 1278, which imposes a \$1/ton waste disposal fee for CDD and CDD residue in 2013 and a \$2/ton fee thereafter. These fees are less than the fees proposed in the legislation pending at the time of the Commissioner’s determination.
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Commissioner has a silver bullet and neither sees any reason (and Spencer offers none) to anticipate that a change in oversight would significantly alter the State's capacity needs.²³

5. An Audit of JRL Would Not Produce any New Information or Otherwise Bear on the Commissioner's Determination that Expansion of JRL Meets the State's Long-Term Capacity Needs.

Spencer's final claim is that a possible audit of JRL by the Office of Program Evaluation & Government Accountability ("OPEGA") could turn up valuable new information and this possibility favors reversal of the PBD approval. This argument is flawed in multiple respects. First, the letter to OPEGA requesting an audit was provided to OPEGA on or around January 30 (and not to DEP), the day before the final PBD decision and is not part of the administrative record. Discussion of this letter and the request for an audit is not material to the present appeal. Second, every ton of waste delivered to JRL is weighed and logged and this information is provided to both SPO and DEP, and is a public record. There is no information the State and others, who choose to review it, do not already have. Third, the possibility of a material change in circumstance or underlying facts is already accounted for in the PBD statute. 38 M.R.S. § 1310-AA(5). The potential for such a development is not grounds for denying a PBD. Rather, actual development of such information, if it ever occurred, could be considered by the Department and at the time the Department could consider modification of the PBD, if warranted. What amounts to pure speculation by Spencer at this juncture, however, is not grounds for reversing the Commissioner's decision and in no way affects the Commissioner's finding that the expansion of JRL meets the State's long-term capacity needs.

²³ After the Commissioner's decision and close of the record, the Committee on Environment and Natural Resources unanimously voted that L.D. 1458 Ought Not to Pass. The bill died and never made it to the floor of the House or Senate. L.D. 1903, which was approved and signed by the Governor on April 24, 2012, will eliminate SPO and transfer solid waste management planning and recycling assistance to DEP.
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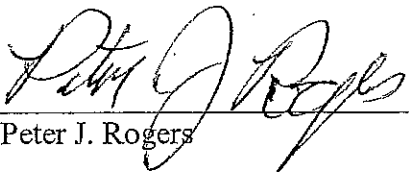
III. Conclusion

JRL will reach its licensed capacity in 2017 or 2018. Licensing the expansion of JRL will take five or six years. Accordingly, SPO filed a PBD application last year in order to avoid a shortfall in the State's long-term ability to manage its solid waste.

Spencer appealed the Commissioner's Order authorizing a moderate 9.35 million cubic yard expansion of JRL, less than half the expansion sought by SPO. He argues that either as a result of yet-to-be proposed expansions at other landfills or reduced solid waste generation rates extending into the future, the expansion of JRL is not needed to meet the State's long-term capacity needs. The data, however, do not support his position. Nor does common sense allow making the type of bet Spencer asks the State to make. Despite the data showing that even at current disposal levels JRL will reach capacity in five to six years and that the State's other licensed landfills will not be in a position to assume JRL's role on a going forward basis, Spencer seeks denial of the PBD Order based almost exclusively on hypotheticals that are unlikely to materialize and are unlikely to have the type of effect Spencer suggests, even if they were to occur. Recognizing her statutory obligation to approve a PBD application that satisfies the requirements of 38 M.R.S. § 1310-AA(3), and applying reason and principles of sound planning, the Commissioner found the modest expansion of JRL provided for in the PBD Order meets the State's long-term capacity needs and will provide a substantial public benefit.

Spencer provides no justifiable basis for altering the Commissioner's determination. SPO and NEWSME respectfully request that the Board deny the appeal and affirm the PBD Order.

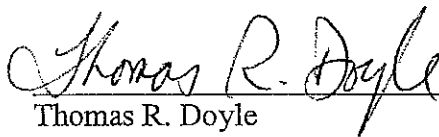
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